

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

MERCY CATHOLIC MEDICAL CENTER,	:	
MERCY PHILADELPHIA HOSPITAL	:	
DIVISION,	:	
Employer,	:	Case No. 4-RC-191143
	:	
and	:	
	:	
DISTRICT 1199C, NATIONAL UNION OF	:	
HOSPITAL AND HEALTH CARE	:	
EMPLOYEES, AFSCME, AFL-CIO,	:	
	:	
Petitioner.	:	

**EMPLOYER’S REQUEST FOR REVIEW OF REGIONAL DIRECTOR’S DECISION**

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Mercy Catholic Medical Center, Mercy Philadelphia Hospital Division (“Employer,” “Mercy” or the “Hospital”) submits this request for review of the June 12, 2017 Decision on Exceptions to the Hearing Officer’s Report on Challenged Ballots of Regional Director Dennis P. Walsh (the “Decision”). The Decision is attached hereto as Exhibit A. In the Decision, Regional Director Walsh affirmed the recommendation of Hearing Officer David Rodriguez to sustain challenges to 30 ballots from the February 7, 2017 election, and to open and count 39 of the challenged ballots. The Regional Director disagreed with the Hearing Officer’s recommendation with respect to one Radiology Technologist Student and two Staffing Specialists, finding that the ballots of the Staffing Specialists should be opened and counted, while the ballot of the Radiology Technologist Student should not.

As described herein, Mercy requests review of the Regional Director’s rulings that the ballots of Mercy’s Patient Access Registration Representatives, Utilization Management Assistant, QR Data Specialist, OR Technicians, and Radiology Technologist Student – a total of 29 ballots – should not be opened and counted. The Regional Director’s decision with respect to each job classification was clearly erroneous based on the record and/or based upon an erroneous application of precedent.

## **I. PROCEDURAL HISTORY**

On January 11, 2017, District 1199C, National Union of Hospital and Health Care Employees, AFSCME, AFL-CIO (“Petitioner”) filed a petition with the Fourth Region of the National Labor Relations Board (“NLRB” or the “Board”) seeking a representation election in a unit of the Employer’s employees. The petition described the proposed bargaining unit as: “all full-time and regular part-time nonprofessional employees, including PCAs, CNAs, Environmental Services and Housekeeping Employees, Unit Facilitators and Unit Clerks,

Transport and Orderly employees, Dietary and Food Service Associates, ER Techs, Mental Health Techs, Monitor Techs, Storage Room employees, Laundry employees and Central Service Tech/SPD employees.” The parties entered into a Stipulated Election Agreement (“SEA”) on January 20, 2017. The Regional Director approved the SEA on January 23, 2017.

Pursuant to the SEA, the unit of eligible voters was described as:

Included: All full-time, regular part time and per diem non-professional employees employed by the Employer at its 501 South 54th Street, Philadelphia, Pennsylvania facility. Excluded: All other employees, including managerial employees, technical employees, professional employees, business office clerical employees, guards and supervisors as defined in the Act.

Mercy is a 157-bed acute care health care facility located in Philadelphia, Pennsylvania. Accordingly, the SEA described a unit conforming to the Board’s Final Rule for appropriate bargaining units in the health care industry, specifically “[a]ll non-professional employees except for technical employees, skilled maintenance employees, business office clerical employees, and guards.” 29 C.F.R. § 103.30(a)(8) (1989) (“Bargaining Unit Rule”). Petitioner and Employer were unable to agree on appropriate unit placement, pursuant to the Bargaining Unit Rule, for Mercy employees in seventeen (17) job classifications, specifically:

- Clerk General
- Clerk Radiology
- Discharge Planning Assistant
- EEG Technician
- Endoscopy Technician
- Health Information Liaison
- Health Information Management Clerk
- Nutrition Aide

- Occupational Health Assistant
- OR Technician
- Patient Access Registration Representative
- Pharmacist Technician
- Physical Therapy Aide
- QR Data Specialist
- Staffing Specialist
- Storeroom Lead
- Utilization Management Assistant

Accordingly, employees in the above listed classifications were permitted to vote in the February 7, 2017 representation election subject to challenge. During the election, Petitioner challenged the ballots of employees in additional classifications, asserting that the employees in such classifications were professional employees inappropriately included in the unit established by 29 C.F.R. § 103.30(a)(3). The specific purported job titles on the ballot challenge envelopes included the following:

- Radiographer
- EKG Tech
- Radiology Tech
- Radiology Aide
- Sterile Process Tech
- CAN – PCA

Finally, one employee (Elaine Creamer), who was not on the list of eligible voters and who claimed to be an Emergency Room Technician when she presented herself to vote, despite being employed by the Hospital as a Paramedic, was challenged by the Board Agent.

On February 23, 2017, the Regional Director Issued a Notice of Hearing on the Challenged Ballots and Objections to Election to be conducted on Monday, March 13, 2017. On February 24, 2017, Mercy filed an Opposed Motion to Reschedule Hearing. After the parties and the Board were able to reach agreement, on March 1, 2017, the Regional Director entered an Order Rescheduling Hearing on Challenged Ballots, which rescheduled the hearing to March 22, 2017.

The hearing was convened on March 22, 2017, at the Board's offices in Philadelphia before Hearing Officer David Rodriguez. Prior to the start of testimony, Mr. Rodriguez stated that the Board was reserving a decision on which party bore the burden of proof on the challenged ballots, and asked the parties to brief the issue in their respective Post-Hearing Briefs. Petitioner dropped its challenges with respect to four voters: CNA-PCA Amanda Moon, Sterile Processing Technician I Charmaine Boyer, and Nutrition Aides Dennis Richardson and Maxine Spivey.

Also prior to the start of testimony, Mercy made a series of preliminary motions. Other than granting Mercy's Motion to sequester witnesses, the Hearing Officer reserved judgment on each of the motions until after the hearing.

During the hearing, the Hearing Officer asked each party to clarify its position on the challenged ballots. Petitioner asserted that it was challenging the following job classifications on the grounds that these classifications belonged in a bargaining unit of business office clerical employees established by 29 C.F.R. § 103.30(a)(6) and not in the nonprofessional bargaining

unit established by 29 C.F.R. § 103.30(a)(8): Clerk (General), Radiology Clerk, Discharge Planning Assistant, Health Information Liaison, Health Information Management Clerk, Patient Access Registration Representative, QR Data Specialist, Staffing Specialist, and Utilization Management Assistant. Petitioner asserted that it was challenging the following job classifications on the grounds that these classifications belonged in a bargaining unit of technical employees established by 29 C.F.R. § 103.30(a)(4) and not in the nonprofessional bargaining unit established by 29 C.F.R. § 103.30(a)(8): EEG Technologist, EKG Technician, Endoscopy Technician, Occupational Health Assistant, Operating Room Technician, Pharmacist Technician (including pharmacy students), Physical Therapy Aide, Radiology Aide and Radiology Technologist Student. Petitioner asserted that it was challenging the ballot of Storeroom Lead Louis Farrar, Jr. on the grounds that Mr. Farrar is a supervisor and therefore ineligible for inclusion in the nonprofessional bargaining unit. Finally, Petitioner asserted that Paramedic Elaine Creamer was actually an Emergency Room Technician, an unchallenged classification, and therefore belonged in the nonprofessional employee bargaining unit.

Mercy asserted that, with the exception of Ms. Creamer, all of the challenged ballots should properly have been placed in the nonprofessional bargaining unit because they did not meet the requirements for the technical and/or business office clerical units, and Mr. Farrar belonged in the bargaining unit because he did not meet the requirements to be classified as a supervisor. With respect to Ms. Creamer, Mercy employed her as a Paramedic, not an Emergency Room Technician, and therefore Mercy asserted that she was not employed in a position eligible to vote in the election.

On April 27, 2017, the Hearing Officer issued a Report on Challenged Ballots (the “Hearing Officer’s Report”). The Hearing Officer’s Report is attached hereto as Exhibit B. In



his Report, the Hearing Officer recommended that, of the 72 challenged ballots, 39 should be opened and counted, but 33 should not be opened. Both Petitioner and the Hospital filed exceptions to the Hearing Officer's Report on May 11, 2017.<sup>1</sup> On June 12, 2017, the Regional Director issued his Decision in which he agreed with all of the Hearing Officer's recommendations, with the exception of a Radiology Technologist Student (whose ballot he determined should not be opened and counted) and two Staffing Specialists (whose ballots he determined should be opened and counted). Based upon the Regional Director's Decision, 41 ballots will now be opened and counted, and 31 will not be. The Regional Director also ruled that Petitioner has the burden of proof to establish the ineligibility of each of the disputed classifications. *See* Decision at 4.

## **II. STATEMENT OF ISSUES**

- A. Did the Regional Director clearly err in ruling that Mercy's Patient Access Registration Representatives should not have their ballots opened and counted because they are Business Office Clerical employees and do not belong in the non-professional bargaining unit established by 29 C.F.R. § 103.30(a)(8)?

Suggested Answer: Yes.

- B. Did the Regional Director clearly err in ruling that Mercy's Utilization Management Assistant should not have her ballot opened and counted because she is a Business Office Clerical employee and does not belong in the non-professional bargaining unit established by 29 C.F.R. § 103.30(a)(8)?

Suggested Answer: Yes.

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<sup>1</sup> Petitioner filed exceptions to six positions that the Hearing Officer recommended including in the bargaining unit: Discharge Planning Assistant, Health Information Liaison, Health Information Management Clerk, Pharmacist Technician, Pharmacist Student and Radiology Technologist Student. The Hospital filed exceptions to five positions that the Hearing Officer recommended excluding from the bargaining unit: Patient Access Registration Representative, Staffing Specialist, Utilization Management Assistant, QR Data Specialist and Operating Room Technician.

- C. Did the Regional Director clearly err in ruling that Mercy's QR Data Specialist should not have her ballot opened and counted because she is a Business Office Clerical employee and does not belong in the non-professional bargaining unit established by 29 C.F.R. § 103.30(a)(8)?

Suggested Answer: Yes.

- D. Did the Regional Director clearly err in ruling that Mercy's Operating Room Technicians should not have their ballots opened and counted because they are Technical employees and do not belong in the non-professional bargaining unit established by 29 C.F.R. § 103.30(a)(8)?

Suggested Answer: Yes.

- E. Did the Regional Director clearly err in ruling that Mercy's Radiology Technologist Student should not have her ballot opened and counted because she is a Technical employee and does not belong in the non-professional bargaining unit established by 29 C.F.R. § 103.30(a)(8)?

Suggested Answer: Yes.

### **III. STANDARD OF REVIEW**

Pursuant to the National Labor Relations Board's Rules and Regulations:

The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:

- (1) That a substantial question of law or policy is raised because of:
  - (i) The absence of; or
  - (ii) A departure from, officially reported Board precedent.
- (2) That the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
- (3) That the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
- (4) That there are compelling reasons for reconsideration of an important Board rule of policy.

NLRB Rules and Regulations, Part 102, § 102.67(d).

#### **IV. SUMMARY OF ARGUMENT**

1. The Regional Director erred in ruling that the ballots of Mercy's Patient Access Registration Representatives ("PARRs") Nicole Baldwin, Dana Berry, Vena Brown, Bernadette Camp, Lisa Dungee, Yvette English, Siedah Harris, Bashirah Hedgepeth, Iesha King, Kafiah Mallory, Kenneth Philson, Rhonda Prioleau, Aricka Ragland, Stephanie Ray, Shirley Registre, Ernestine Roberts, Starshema Robinson, Donna Saunders, Shelene Smith and Sheena Stone should not be opened and counted. Petitioner did not meet its burden of proof to show that PARRs meet the criteria for placement in a bargaining unit of Business Office Clerical employees. Rather, the record demonstrates that PARRs properly belong in the non-professional bargaining unit established by 29 C.F.R. § 103.30(a)(8). The Regional Director's holding to the contrary was clearly erroneous and must be overturned.

2. The Regional Director erred in ruling that the ballot of Mercy's Utilization Management Assistant Emily Tilghman should not be opened and counted. Petitioner did not meet its burden of proof to show that Ms. Tilghman's position meets the criteria for placement in a bargaining unit of Business Office Clerical employees. Rather, the record demonstrates that Ms. Tilghman properly belongs in the non-professional bargaining unit established by 29 C.F.R. § 103.30(a)(8). The Regional Director's holding to the contrary was clearly erroneous and must be overturned.

3. The Regional Director erred in ruling that the ballot of Mercy's QR Data Specialist Decis Gordon should not be opened and counted. Petitioner did not meet its burden of proof to show that Ms. Gordon's position meets the criteria for placement in a bargaining unit of Business Office Clerical employees. Rather, the record demonstrates that Ms. Gordon properly belongs in

the non-professional bargaining unit established by 29 C.F.R. § 103.30(a)(8). The Regional Director's holding to the contrary was clearly erroneous and must be overturned.

4. The Regional Director erred in ruling that the ballots of Mercy's Operating Room Technicians ("ORTs") Lenora Drummond, Tracy Ellerbe, Pamela Isham, Crystina McDonald, Thomas Wells and Sherri Woodley should not be opened and counted. Petitioner did not meet its burden of proof to show that ORTs meet the criteria for placement in a bargaining unit of Technical employees. Rather, the record demonstrates that Mercy's ORTs properly belong in the non-professional bargaining unit established by 29 C.F.R. § 103.30(a)(8). The Regional Director's holding to the contrary was clearly erroneous and must be overturned.

5. The Regional Director erred in ruling that the ballot of Mercy's Radiology Technologist Student Jennifer Myuers should not be opened and counted. Petitioner did not meet its burden of proof to show that Ms. Myuers meets the criteria for placement in a bargaining unit of Technical employees. Rather, the record demonstrates that Ms. Myuers properly belongs in the non-professional bargaining unit established by 29 C.F.R. § 103.30(a)(8). The Regional Director's holding to the contrary was clearly erroneous and must be overturned.

## **V. ARGUMENT**

### **A. The Regional Director's Finding That the Hospital's Patient Access Registration Representatives Should Be Placed in a Business Office Clerical Bargaining Unit is Clearly Erroneous.**

The Regional Director erred in ruling that the Hospital's PARRs should be included in a Business Office Clerical ("BOC") bargaining unit and are therefore ineligible to vote in the contested election.

In discussing the difference between BOCs and hospital clerical employees, the Regional Director cited precedent in which the Board held that BOCs "have minimal contact

with unit employees or patients;” “work in geographic areas of the hospital ... separate and apart from service and maintenance employees;” and that the work of BOCs “is generally limited to finance, billing, and insurance, and is not directly involved in patient care or with physical or environmental health.” Decision at 9 (citations omitted). The Regional Director further noted that hospital clerical employees “generally have continual contact with patients;” “are physically separated from business office employees;” “work primarily with patients and patients’ records rather than the materials with which BOCs work;” and “are not supervised by the people who supervise BOCs.” Decision at 10 (citations omitted).

The Regional Director then ignored these factors in ruling that Mercy’s PARRs are BOCs, not hospital clerical employees, and that their ballots should not be opened and counted. The record demonstrated conclusively that (1) PARRs have consistent contact with patients; (2) are directly involved in patient care, and are not limited to finance, billing and insurance; (3) are physically separated from business office employees; (4) work primarily with patients and patients’ records; and (5) are not supervised by the people who supervise BOCs.

The record in this matter shows that PARRs greet patients, pre-register them, and register them. PARRs are often the first person a patient meets in the hospital. They are responsible for introducing the patient to the hospital. Hearing Transcript (“Tr.”) at 131:19-132:1. PARRs collect key demographic information from the patient, including information required by National Patient Safety Goals, as well as advanced directives, next of kin and emergency contacts. All of the information is put in the Hospital’s Meditech information system, which then goes to the hospital’s other systems for use by the caregivers. Tr. at 126:10-127:3; Hearing Exhibit E-12, attached hereto as Exhibit C. PARRs are thus directly involved in patient care and have consistent contact with patients.

The Regional Director's characterization that the work of BOCs "is generally limited to finance, billing, and insurance" is a misstatement of the Board's Rulemaking. The Regional Director based this statement on *Lifeline Mobile Medics, Inc.*, 308 NLRB 1068 (1992). Decision at 9. The *Lifeline Mobile Medics* ruling relied on the NLRB's 1988 and 1989 rulemaking on collective bargaining units in the health care industry. However, the opinion in *Lifeline Mobile Medics* incorrectly cited the Board's Rulemaking, an error carried forward by the Regional Director here. The Board's Rulemaking does not state that a BOC's work is generally limited to finance, billing and insurance; rather, the Rulemaking advises: "Business office clericals are primarily responsible for a hospital's financial and billing practices, and deal with Medicare, DRGs, varying price schedules, multiplicity of insurance types, and new reimbursement systems." See NATIONAL LABOR RELATIONS BOARD, SECOND NOTICE OF PROPOSED RULEMAKING, 53 FR 33900-01, 33924-33925 (Sept. 1, 1988), 1988 WL 25395053 ("Notice"), at 39. Thus, it is not correct that a BOC's responsibilities are generally limited to "insurance" at all, and, to the extent this component of the ruling in *Lifeline Mobile Medics* has become established precedent, it should be reconsidered and reversed.

Even if BOCs are "generally limited to finance, billing and insurance," the record is clear that Mercy's PARRs do not meet this standard. PARRs play no role in finance at all, and, although the Regional Director found that PARRs "are evaluated on their significant insurance and billing related duties," there was no evidence in the record to justify a finding that the PARRs' duties in this regard are "significant." Insurance is only one of six categories upon which a PARR's performance is evaluated, and other than collecting basic billing information from a patient, the PARRs play no role with respect to billing whatsoever. See Exhibit C. Furthermore, even if PARRs do perform an insurance-related function, there is no evidence that

they “deal with Medicare, DRGs, varying price schedules, multiplicity of insurance types, and new reimbursement systems.” None of the duties identified in the PARR performance evaluation relates to these functions. *See* Exhibit C.

Even if the PARRs did have “significant insurance and billing related duties,” that is neither the standard used in *Lifeline Mobile Medics* nor the one actually enunciated by the Board in its Rulemaking. To be a BOC, an employee’s job duties must either be *limited* to finance, billing and insurance, or the employee must be *primarily responsible* for a hospital’s financial and billing practices. There is no conceivable way to describe the PARRs’ job duties in either manner, and the Regional Director’s conclusion to the contrary was clearly erroneous. Petitioner did not meet its burden on this issue.

PARRs are also physically separated from the Hospital’s BOC employees. The record clearly demonstrated that there is no business office at the Hospital. Mercy is part of the Mercy Health System of Southeastern Pennsylvania, which includes Nazareth Hospital, which is located in northeast Philadelphia. The health system as a whole has a corporate and business office located in Conshohocken, Pennsylvania, which includes the senior executives of the health system, as well as business office and clerical functions such as billing, credentialing, and insurance verification. Tr. at 34:12-35:16.

PARRs work primarily with patients and patient records. Indeed, that is their primary responsibility. Furthermore, they have their own supervision – they are not supervised by people who also supervise BOCs. Tr. at 95:1-4; *id.* at 143:2-3.

The Regional Director further erred in adopting the Hearing Officer’s finding that that nine of the PARRS work “away from patient care areas.” Decision at 13; Hearing Officer Report at 29. Within the Hospital, PARRs sit at three different locations. There is a registration

desk in the Hospital's emergency room, and there are desks at two separate outpatient areas. Tr. at 130:25-131:4. The Hospital puts PARRs in those locations because they are the areas closest to the clinical areas they service and register patients. Tr. at 131:5-10. Even the PARRs outside the emergency department are "registering patients who are receiving procedures for the day." Tr. at 135:2-3. There was no basis for the Regional Director's holding that any PARRs do not work in patient care areas, and the record evidence in fact demonstrates the exact opposite.

The Regional Director further misstated precedent by noting, "Admitting clerks are generally included in a BOC unit." Decision at 12. While the NLRB has held on certain occasions that admitting clerks belong in a BOC unit, there is equally substantial precedent holding that employees similar to Mercy's PARRs belong in a hospital clerical unit. *See Rhode Island Hospital*, 313 NLRB 343, 361 (1993); *William J. Backus Hospital*, 220 NLRB 414, 415-16 (1975); *St. Catherine's Hospital*, 217 NLRB 787, 790 (1975).<sup>2</sup> There is no definitive guidance offered by previous rulings on this issue. Rather, each case requires a fact-specific inquiry. As described above, the facts of this case show that Mercy's PARRs do not belong in a BOC bargaining unit because they do not meet the criteria enunciated by the Board. The Regional Director's decision to the contrary ignored the critical facts, was clearly erroneous, and relied on a misapprehension of the Board's Rulemaking. The Board should overturn this ruling.

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<sup>2</sup> In his Decision, the Regional Director stated that the NLRB opinions in *William J. Backus Hospital* and *Jewish Hospital of Cincinnati* were "clearly distinguishable from the instant case." Decision at 13. However, the Regional Director did not describe why he believed the opinions were "clearly distinguishable," and Mercy believes they are not.



**B. The Regional Director's Finding That the Hospital's Utilization Management Assistant Should Be Placed in a Business Office Clerical Bargaining Unit is Clearly Erroneous.**

The Regional Director erred in ruling that the Hospital's Utilization Management Assistant ("UMA") should be included in a Business Office Clerical bargaining unit and is therefore ineligible to vote in the contested election.

As described above, the Regional Director's statement that the work of BOCs is "generally limited to finance, billing and insurance" is an incorrect characterization of the Board's guidance. With respect to insurance, the Rulemaking states that BOCs "deal with Medicare, DRGs, varying price schedules, multiplicity of insurance types, and new reimbursement systems." Notice at 39. The distinction is critical with respect to the analysis of Mercy's UMA. Although she serves as a liaison between the hospital's physician advisor and the physician advisors of insurance companies, there is no evidence in the record establishing that she deals with Medicare, DRGs, varying price schedules, multiplicity of insurance types, and new reimbursement systems. Her interactions with insurance companies are with doctors, not insurance professionals, accountants or those who pay claims. Tr. at 471:2-479:1. The UMA has no role with respect to payment of claims by insurance companies, and is not involved in the billing or financial aspects of insurance coverage. *Id.* Rather, her work relates more to the treatment of the Hospital's patients.<sup>3</sup>

Petitioner failed to offer any evidence to demonstrate that Mercy's UMA falls within the far narrower insurance role that would have made her a BOC, and thus failed to meet its burden on this issue.

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<sup>3</sup> For this reason, the Hearing Officer's reliance on three Board opinions ruling that "insurance clerks" are BOCs, without describing the details of the positions at issue, was inappropriate. Hearing Officer's Report at 25.

In agreeing with the Hearing Officer's recommendation with respect to the UMA, the Regional Director repeated the Hearing Officer's mistake of ignoring the vast evidence supporting the UMA's status as a non-professional employee whose ballot should be opened and counted. The UMA position requires only a high school diploma, and does not require any certifications or licensures. Tr. at 160:9-16. The position is paid at pay grade F05 – the same grade as many other Hospital employees allowed to vote as non-professional employees. Hearing Exhibit E-8, attached hereto as Exhibit D. Mercy's UMA also does not share supervision with any BOC employees, and is not supervised by any financial administrators. Tr. at 151:3-8. As noted above, there is no business office at the Hospital.

Furthermore, although the Regional Director acknowledged that the UMA performs the duties of a Discharge Planning Assistant ("DPA") approximately twice per month, he inappropriately dismissed that as a factor in his determination. Decision at 11. The Regional Director should have given greater weight to the fact that the UMA acts as a DPA – a position included in the bargaining unit – at least once approximately every other week. This demonstrates a clear community of interest between the UMA and the DPAs.

Based on the overwhelming weight of the evidence, the Utilization Management Assistant is a hospital clerical and not a BOC. Petitioner failed to meet its burden to prove otherwise, and the Regional Director should have found that the UMA is appropriately included in the nonprofessional unit established by 29 C.F.R. § 103.30(a)(8). The Board should overturn the Regional Director's ruling.

**C. The Regional Director's Finding That the Hospital's QR Data Specialist Should Be Placed in a Business Office Clerical Bargaining Unit is Clearly Erroneous.**

The Regional Director erred in ruling that the Hospital's QR Data Specialist should be included in a Business Office Clerical bargaining unit and is therefore ineligible to vote in the contested election.

In ruling that the ballot of Mercy's QR Data Specialist should not be opened and counted, the Regional Director stated, "In limited circumstances, the Board has found employees who work with medical records to be BOCs when they are geographically isolated and work with other BOC classifications." Decision at 13 (emphasis added). Yet Mercy's QR Data Specialist does not work with any other employees in a BOC classification, nor was there any evidence to suggest otherwise. She does not share supervision with BOCs (rather, she is supervised by a nurse and shares supervision with QR nurses), and there was no evidence showing that she interacts with BOCs at all in the normal performance of her duties. Tr. at 198:19-199:15. The "limited circumstances" noted by the Regional Director are thus not present here, and the Regional Director was clearly erroneous in his finding on that issue.

In his Decision, the Regional Director distinguished *Baptist Memorial Hospital*, 225 NLRB 1165 (1976), an opinion in which the Board held that a utilization management coordinator was not a BOC because that position "abstracts information from the forms and enters it on a previously recorded chart. The coordinator does not exercise independent judgment concerning information contained in the forms, but merely ensures that they are complete and that the review and patient discussions by the RN's were properly conducted on the patient floors." *Id.* at 1170; Decision at 11. Although the Board's analysis in *Baptist Memorial Hospital* was conducted for a utilization management position, Mercy's QR Data

Specialist has similar job duties and similarly should have been found not to be a BOC employee. Mercy's QR Data Specialist abstracts data from randomly selected medical records, reviews them against predetermined criteria, and enters the results into a quality data system. If she finds that the criteria were not met, she gets additional information from the nurses or nurse managers. She is not able to correct medical records on her own and exercises no independent judgment in the course of her duties. Tr. at 200:10-201:23. The Regional Director erred in failing to apply the reasoning of *Baptist Memorial Hospital* to the QR Data Specialist position at Mercy.

The vast weight of evidence counsels in favor of the QR Data Specialist being included in the non-professional bargaining unit and having her ballot opened and counted, and Petitioner failed to meet its burden to prove otherwise. The QR Data Specialist position requires only a high school diploma, and does not require any special certification or licensure. Tr. at 200:1-9.4 The position is not part of the hospital's financial or billing practices, nor, to the extent that the Board finds this to be a relevant criterion, does she have any role with insurance-related matters.

The Hearing Officer and Regional Director have both found that all of the Hospital's other medical records employees are non-professional employees whose ballots should be opened and counted. The lone exception is Mercy's QR Data Specialist. There is no basis for this distinction. Separating the QR Data Specialist from other medical records employees creates needless ambiguity, and there are no "limited circumstances" that warrant such a finding. Rather, the QR Data Specialist's job duties squarely place her in the

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<sup>4</sup> The Regional Director noted that, according to the job description and position evaluation, a QR Data Specialist must have *either* an Associate's Degree or three years of equivalent experience. Decision at 14. Thus, it cannot be said that an Associate's Degree is *required* for the position. The only baseline educational requirement for a candidate is a high school diploma.

non-professional bargaining unit established by 29 C.F.R. § 103.30(a)(8), and her ballot should be opened and counted. The Board should overturn the Regional Director's ruling.

**D. The Regional Director's Finding That the Hospital's Operating Room Technicians Should Be Placed in a Technical Bargaining Unit is Clearly Erroneous.**

The Regional Director erred in ruling that the Hospital's Operating Room Technicians ("ORTs") should be included in a Technical bargaining unit and are therefore ineligible to vote in the contested election.

In his Decision, the Regional Director identified key criteria that distinguish technical employees from other non-professional employees. According to the Regional Director, those criteria include, *inter alia*, the use of independent judgment and specialized training; significant education or training beyond high school; a certification, license or registration with state authorities; earning more than other non-professional employees; and not working in a patient care area.

These criteria weigh against the Regional Director's holding that ORTs are technical employees whose ballots must not be opened and counted. Critically, ORTs do not use independent judgment – nor did the Regional Director find that they did. Rather, in his Decision, he focused on the fact that ORTs "are responsible for selecting and preparing the instruments to be used during operative procedures." Decision at 6. But there is no independent judgment involved in either selecting instruments or preparing them. Rather, the record demonstrated that ORTs know which instruments to use because physicians fill out preference cards. Tr. at 303:4-9. ORTs also clean instruments after procedures – a job duty performed by the Hospital's Sterile Processing Technicians, a position that is included in the bargaining unit. Tr. at 300:6-15; *id.* at 304:10-18.

Unlike ORTs at other hospitals, Mercy's ORTs are not required to hold a certification, license or registration. Tr. at 301:17-21. They also work in the operating room – clearly a patient care area.

Based on the established criteria, the Regional Director was clearly erroneous in ruling that the ballots of Mercy's ORTs should not be opened and counted. *Mercy Hospitals of Sacramento*, 217 NLRB 765, 771 (1975); *Barnert Memorial Hospital*, 217 NLRB 775, 780 (1975) (non-certified operating room technician); and *St. Catherine's Hospital*, 217 NLRB 787, 790 (1975) (surgical technicians as compared to certified surgical technicians). The Board should overturn the Regional Director's ruling.

**E. The Regional Director's Finding That the Hospital's Radiology Technologist Student Should Be Placed in a Technical Bargaining Unit is Clearly Erroneous.**

The Regional Director erred in ruling that the Hospital's Radiology Technologist Student ("RTS"), Jennifer Myuers, should be included in a Technical bargaining unit and is therefore ineligible to vote in the contested election.<sup>5</sup>

In his Decision, the Regional Director noted, "The Board has consistently found that radiology technologists are technical employees." Decision at 8. The Hospital does not dispute this conclusion. However, the Regional Director went further, noting that, "In *Rhode Island Hospital*, supra at 365-66, the Board excluded radiology students from a unit of nonprofessional employees." *Id.* While this is true, the Regional Director failed to note that, in *Rhode Island Hospital*, the Board *also excluded the radiology students from a unit of technical employees*. Instead, the Board held that the students did not belong in any bargaining unit at all. *See Rhode Island Hospital, supra*, at 365-66. Here, neither party argues that RTSs should be

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<sup>5</sup> As the Regional Director noted, there were no exceptions filed with respect to the Hearing Officer's recommendation that another RTS, Blase Canterbury, be excluded from the bargaining unit because she failed to meet the election eligibility formula. Decision at 8 n.3.

excluded from any bargaining unit, and the decision in *Rhode Island Hospital* is thus inapplicable.<sup>6</sup> The only question before the Regional Director was whether Petitioner met its burden of showing that RTSs belong in a technical unit and not the non-professional unit, and his reliance on *Rhode Island Hospital* was therefore inappropriate.

The Regional Director further erred in holding that RTSs perform all the duties of Radiology Technologists, under their indirect supervision. Decision at 8. In making this holding, the Regional Director ignored that the requirement to work with supervision is itself a component of the RTS position, and therefore a key distinction separating the job duties of a licensed Technologist from those of a student. It is the ability to work without supervision that involves the use of independent judgment that makes the Technologist a technical employee. The RTSs' *inability* to work without supervision shows that they do not have the ability to use independent judgment sufficient to make them technical employees. Rather, the licensed Technologist's supervision is required by law, and RTSs are never permitted to work when they cannot be supervised. Tr. at 272:23-25; *id.* at 273:9-11. RTSs cannot work independently. Tr. at 287:17-23. The Regional Director failed to observe this key distinction, and in so doing, was clearly erroneous.

There are also obvious differences between licensed Technologists and RTSs with respect to education. RTSs have completed only one year of the technologist program. Tr. at 286:5-7. The Technologists, by definition, have completed such a program.

Petitioner failed to meet its burden of proof to show that RTSs belong in the Technical bargaining unit. The evidence presented shows that RTSs belong in the

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<sup>6</sup> To the extent Petitioner attempts to argue now that RTSs do not belong in any bargaining unit because of their student status, such argument would be untimely and must be dismissed. *See* Board Rules and Regulations, § 102.67(e) (A request for review "may not raise any issue or allege any facts not timely presented to the Regional Director").

non-professional bargaining unit established by 29 C.F.R. § 103.30(a)(8), and Ms. Myuers' ballot should be opened and counted. The Board should overturn the Regional Director's ruling.

## **VI. CONCLUSION**

For the reasons stated above, the Regional Director clearly erred when he found that Mercy's Patient Access Registration Representatives, Utilization Management Assistant, QR Data Specialist, Operating Room Technicians and Radiology Technologist Student are not properly included in the non-professional bargaining unit, and that their ballots cast on February 7, 2017 should not be opened and counted. Mercy's Patient Access Registration Representatives, Utilization Management Assistant, QR Data Specialist, Operating Room Technicians and Radiology Technologist Student are properly part of the bargaining unit for nonprofessional employees described in 29 C.F.R. § 103.30(a)(8). The Board should overturn the Regional Director's ruling with respect to these positions, and their ballots should be opened and counted.

Respectfully submitted,

STEVENS & LEE

Date: June 23, 2017

By: /s/ Joseph P. Hofmann

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**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 4**

MERCY CATHOLIC MEDICAL CENTER,	:	
MERCY PHILADELPHIA HOSPITAL	:	
DIVISION,	:	
Employer,	:	Case No. 4-RC-191143
	:	
and	:	
	:	
DISTRICT 1199C, NATIONAL UNION OF	:	
HOSPITAL AND HEALTH CARE	:	
EMPLOYEES, AFSCME, AFL-CIO,	:	
	:	
Petitioner.	:	

**CERTIFICATE OF SERVICE**

I, JOSEPH P. HOFMANN, hereby certify that I am this day, serving the foregoing Employer's Request for Review of Regional Director's Decision upon the persons and in the manner indicated below:

1. Service by e-mail to lleshinski@freedmanlorry.com; and
2. Service by First Class Mail addressed as follows:

Lisa Leshinski  
Freedman and Lorry, P.C.  
1601 Market Street, Suite 1500  
Philadelphia, PA 19103

Date: June 23, 2017

/s/ Joseph P. Hofmann  
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Joseph P. Hofmann